

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

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### I.

#### Opinions of the Courts Below.

No written opinion was rendered by the trial court. The journal entry of the order of the trial court sustaining petitioner's motion to dismiss appears at page 14 of the record. The opinion of the Circuit Court of Appeals appears in the record beginning at page 93. It is not officially reported.

### II.

#### Jurisdiction of This Court.

The grounds of jurisdiction of this court were stated under II of the petition for writ of *certiorari*.

### III.

#### Statement of the Case.

This has been sufficiently covered under I in the petition for writ of *certiorari* and in the interest of brevity is not repeated here.

### IV.

#### Specifications of Errors.

The Circuit Court of Appeals erred as follows:

(1) In failing to give effect to the rule that it was bound to follow controlling decisions by the Supreme Court of Oklahoma.

(2) In failing to abide by controlling decisions of the

Supreme Court of Oklahoma which required it to affirm the judgment of the trial court.

V.

**Argument.**

Following is a summary of the points which will be argued:

(1) This cause is governed by controlling decisions of the Supreme Court of Oklahoma.

(2) By reason of the decision in *Miller v. Miller* the instant action cannot be maintained.

(3) The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*.

(4) Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.

(5) No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.

POINT ONE.

**This cause is governed by controlling decisions of the Supreme Court of Oklahoma.**

—*Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

*West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. ed. 139, 144:

“Rules of decisions established by judicial decisions of State Courts, as well as those prescribed by

Statute are 'laws' within the requirement of the judiciary act (28 U. S. C. A., Sec. 725) that state laws shall be the rules of decision in trials at common law in the Federal Court. (p. 139)

"\* \* \* the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by the Federal Courts as defining state law, \* \* \*. But the obvious purpose of Section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the Federal Courts only in case of diversity of citizenship. That object would be thwarted if the Federal Courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." (p. 144)

*Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. ed. 1477:

"The proper function of a Federal Court in a case governed by state law, is to ascertain what the state law is, not what it ought to be."

—*Griffin v. McCoach*, 313 U. S. 498, 85, L. ed. 1481.

The Circuit Court of Appeals obviously overlooked the doctrine of the above cases because it cites cases from New York, New Jersey, California, Utah, Ohio, Michigan, Kentucky and Missouri, and also general text books on the subject and applies the general rule of law so formulated from these conflicting decisions to the case at bar.

#### POINT TWO.

**By reason of the decision in *Miller v. Miller* the instant action cannot be maintained.**

*Miller v. Miller* was brought in the state court to determine the extent of defendant's obligation to pay alimony

and for a decree in accordance with such determination. The issue in the case was the amount of alimony, if any, which plaintiff was entitled to recover from defendant. The separate maintenance contract was pleaded and offered in evidence in support of plaintiff's case. Defendant pleaded that he had fully discharged his obligation to pay alimony and denied liability.

Upon the issues so presented the state trial court found "that the amount paid by said Herbert Frederic Miller to Elsie A. Miller was a fair and reasonable amount to be paid by him to said Elsie A. Miller as alimony for herself and as support and maintenance of said child of said parties, and is all the money that should be paid by said Herbert Frederic Miller to said Elsie A. Miller as alimony for herself and as support and maintenance money for said child," (R. 82)

and concluded as a matter of law

"that the amount which has been paid by the defendant to the plaintiff between November 3, 1923, and the date of the filing of the petition in this cause, was paid by the defendant to the plaintiff both as alimony for plaintiff, and for support and maintenance of the minor child of plaintiff and defendant, and in lieu of a property division between plaintiff and defendant, and the court concludes as a matter of law that the total sum so paid by the defendant to the plaintiff was a fair and reasonable amount in full settlement of all alimony claims of the plaintiff, and of all claims for the support and maintenance of the minor child of plaintiff and defendant, and for all claims of property rights by the plaintiff against the defendant, and that the defendant should not be required to pay any further sum to the plaintiff by virtue of any of the facts alleged in plaintiff's petition." (R. 83)

On appeal to the Supreme Court of Oklahoma the judg-

ment of the trial court was affirmed except with respect to attorney's fees and costs, and the case was remanded to the trial court for a hearing "for that purpose only."

The following language of the Supreme Court strikes down the alleged contract:

"\* \* \* it appears that the theory upon which recovery of permanent alimony was denied was that the defendant had adequately discharged his duty to pay alimony by the payments voluntarily made pursuant to the agreement or arrangement, existing between the parties subsequent to their separation" (p. 518 of 99 P. (2d)), and "we are not justified in concluding that the trial court abused its judicial discretion in determining that said amount satisfied defendant's legal obligation to his former wife and their daughter who has now attained her majority." (p. 519)

The "agreement or arrangement existing between the parties," referred to in the State Supreme Court opinion, is the alleged contract upon which respondent now seeks to recover, and since the state court has determined that petitioner "by the payments voluntarily made pursuant to the agreement or arrangement" has fully discharged his duty to pay alimony, it follows that the alleged contract can not be made the basis of recovery in this action.

Since the complete primary obligation to support was discharged, as the court says it was, the contract is extinguished because it fixed the extent of that same primary obligation to support.

***The state court judgment is tantamount to a disapproval of the alleged contract as entitling respondent to any additional alimony.***

We think the Circuit Court of Appeals erroneously held

that the state court did not purport to disapprove or supersede the alleged contract.

The Supreme Court found that respondent had received everything to which she was entitled and it follows that if by virtue of the contract she received any more she would receive something to which she was not entitled, and no intention can be imputed to the Supreme Court to leave the way open for her to receive anything to which she is not entitled.

A similar situation was before the Supreme Court in *Dresser v. Dresser*, 164 Okl. 94, 22 P. (2d) 1012. In that case the parties had entered into an alimony contract whereby defendant agreed to pay plaintiff \$1,000.00 per month, which was embodied in a subsequent divorce decree. The decree was void as to alimony because not rendered for a definite sum. (*Dutton v. Dutton*, 97 Okl. 234, 223 Pac. 149; *Boulanger v. Boulanger*, 127 Okl. 103, 260 Pac. 49.) Plaintiff sued primarily for such alimony as would be equitable or in the alternative for equitable damages on the contract. The Supreme Court having found that she was not entitled to recover, said:

“Her contract was subject to an adjudication of the court upholding it or setting it aside, and since we have concluded that she was entitled to recover nothing, the agreement was manifestly unfair.”

#### POINT THREE.

**The Circuit Court of Appeals was bound by controlling decisions of the Supreme Court of Oklahoma under which the contract sued on was extinguished by the state court judgment in *Miller v. Miller*.**

In Oklahoma, a contract for alimony or separate maintenance, even if valid, creates no new duty, it merely pur-

ports to fix, by agreement of the parties instead of by court decree, the extent of the undischarged obligation resulting from the husband's alleged violation of his marital duty to support and maintain his wife or former wife. Some court had jurisdiction to determine the measure and extent of petitioner's obligation to pay alimony. It was not the divorce court in New Jersey because petitioner had been constructively served. It was the Oklahoma court in *Miller v. Miller* (*Spradling v. Spradling*, 74 Okl. 276, 181 Pac. 148; *West v. West*, 114 Okl. 279, 246 Pac. 599). Respondent sued in that court for the determination of her alimony rights. She pleaded the alleged alimony contract, asked its approval, and for alimony in accordance therewith and for additional alimony. She had but one remedy—a suit for alimony—whether measured by proof of petitioner's primary obligation or by the separate maintenance agreement. Both were considered by the court, which found and determined that petitioner's obligation to pay alimony had been fully discharged. We contend that respondent's claim for alimony was thereby wiped out, which resulted in extinguishing the contract. The Circuit Court of Appeals holds, however, that the contract was not extinguished and survived the state court judgment because "the remedy afforded for alimony, incidental to divorce, and a remedy upon a separate maintenance agreement, independent of the divorce and alimony proceedings, are not inconsistent but concurrent remedies, and a defaulting party may be bound by both the decree for alimony and the agreement." (R. 100) Cited in support of this holding are four California cases, one New York case, and one Federal case that originated in Oregon. No Oklahoma cases are cited and the holding of the court is contrary to *Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643; *McRoberts v. McRoberts*, 177 Okl. 156, 57 P.

(2d) 1175, controlling decisions of the highest court in Oklahoma.

*Finley v. Finley* was a suit on a separate maintenance agreement which had been incorporated in a divorce decree which was void as to alimony because it did not limit the amount of alimony payments in time or total. The alimony agreement was not entered into with the expectation that it would be submitted to a court "so long as both parties live up to the provisions of these articles of agreement," but that either party was at liberty to bring suit for divorce. Notwithstanding this provision of the contract, plaintiff four days after execution of the contract sued her husband for divorce and in her petition set forth the foregoing contract and prayed for alimony in the amount provided therein. The action was not contested and the provisions of the agreement were incorporated in the divorce decree. In holding that the divorce court is not bound by an alimony agreement and that a decree fixing alimony extinguishes a pre-existing alimony contract, the court said:

"Suppose the court not feeling bound by the contract had awarded the plaintiff in the divorce action only \$30 per month instead of the \$60 which was awarded. Could the wife receive and accept the \$30 per month, under said divorce decree, and then maintain an action on the contract for \$60 per month? It is obvious that she could not, for in such a case it is apparent that the contract would be extinguished by the decree."

This is directly contrary to the opinion of the Circuit Court of Appeals in the case at bar that "a defaulting party may be bound by both the decree for alimony and the agreement." (R. 100)

Could the court have any more plainly said that the



contract is gone when the issue of alimony is tendered and determined?

*McRoberts v. McRoberts* was a suit upon a contract which had been entered into in contemplation of divorce and which attempted to fix the property rights of the parties. The divorce had been granted in Georgia and the property rights determined in accordance with the contract. In holding that the only effect of the contract was to assist the court in determining alimony the court said:

“ \* \* \* The rule of law is universal that such a contract is not binding on the divorce court, and that *the court may ignore it*, if it does not conform to the equities in this case. \* \* \* ” (p. 1177) (Italics ours.)

and held that the contract was extinguished by the alimony decree, saying:

“ \* \* \* let us assume that the court granted the divorce, but not feeling bound by the contract, awarded \$75 monthly, or \$300 monthly: it is obvious that the plaintiff could not then later sue on the contract for the difference between the \$75 awarded and the \$150 contemplated in the contract, nor could the defendant insist upon paying only \$150 a month, if the award had been \$300, on the contention that he had contracted to pay only \$150, and therefore was not bound by the decree. It is thus apparent that if the effect of the contract is enlarged to any greater field than that of assistance and aid to the court in the determination of the immediate controversy, we are at once confronted with an entangling maze of legal contradictions and incongruities.

“The next question, then, is: When does such a contract become extinguished? The logical answer seems to be that it becomes extinguished when, as in the case of other contracts, it has served its purpose. We have already defined its purpose. Our view of the

matter is that when the property relationship and duties of the parties were considered by the divorce court, including not only their own ideas thereof as expressed in the contract, but also all surrounding circumstances, and on those facts the decree was formed and entered, the contract, if it may be called such, had served its purpose and thereby became extinguished."

The Circuit Court of Appeals attempts to distinguish *Finley v. Finley* and *McRoberts v. McRoberts* upon the ground that the contracts involved in these cases were extinguished because they had served their manifest purposes by having been submitted to the divorce courts and incorporated in the divorce decree, whereas the parties did not intend the contract in the case at bar to be " \* \* \* submitted and approved by the divorce court and as approved, incorporated in and superseded by the divorce decree. \* \* \*" Said the Circuit Court of Appeals:

"What was the purpose of the appellant when she submitted the alleged agreement to the alimony court in Oklahoma? She sought to have the same approved, and as approved superseded by the equitable judgment of the court. But the Oklahoma court, treating the action as one for alimony, merely considered the amount of money which the appellee had paid to the appellant, and based upon that proof, the court adjudged that appellant had been paid all to which she was equitably entitled under the applicable laws of Oklahoma. Its judgment did not purport to approve, disapprove, modify, annul, or supersede the alleged contract. On the other hand, it expressly refused to adjudicate the contractual rights of the parties under the alleged agreement, and by fair implication, we think, left the appellant to her remedy on the contract. *Miller v. Miller*, *supra*, p. 520. See also *Murphy v. McElroy*, *supra*; *Seyler v. Seyler*, *supra*; *Elliot v. Dunham*, *supra*; *Corbin v. Mathews*, *supra*."

It is not a question of what was the purpose of the respondent in submitting the contract to the Oklahoma court, but what was the *effect* under controlling Oklahoma decisions of submitting such contract to the court. *Finley v. Finley*, 174 Okl. 457, 50 P. (2d) 643, 646, answers that question:

“When the wife submitted the contract to the court in the divorce case, she chose her forum for the enforcement thereof, even though it was not a contract in contemplation of divorce. \* \* \* ”

If the submission of the contract to the Oklahoma Court had the same effect as in *Finley v. Finley*, where the contract was not entered into in contemplation of being submitted to the divorce court; or in *McRoberts v. McRoberts*, where the contract was held to have been a mere guide in determining alimony, then the contract has been extinguished. It was not material that the Oklahoma court was not the divorce court. It was the alimony court and as was said in *Spradling v. Spradling*, *supra*:

“ \* \* \* ‘We see no difference between this and any other divorce suit, so far as the question of alimony is concerned. \* \* \* ’ ”

*Seyler v. Seyler*, 190 Okl. 250, 122 P. (2d) 804, approves the doctrine of *Finley v. Finley* and *McRoberts v. McRoberts*. That was an action at law on a separate maintenance contract after a divorce decree silent as to alimony. The court said:

“ \* \* \* defendant cites many cases which hold that such agreements are not binding upon a court in a divorce action. But nearly all the cases cited are where the agreement was presented to the court in the divorce proceeding. The general rule seems to be that where

this is done the court in passing upon the question of alimony may approve and adopt the agreement, reject it entirely, or modify it as the facts and circumstances may warrant.

“The question is whether the agreement was extinguished by the decree of divorce. *McRoberts v. McRoberts*, \* \* \* answers that question. \* \* \*, ‘When the property relationship and duties of the parties were considered by the divorce court, including not only their own ideas thereof as expressed in the contract, but also all surrounding circumstances, and on those facts the decree was formed and entered, the contract, if it may be called such, had served its purpose and thereby became extinguished.’

“In this case the agreement was never presented to or considered by the court. It could not have been extinguished under the rule above stated. *There was no issue of alimony, division of property or property settlement presented in the pleadings or settled by the court.*” (Italics ours.)

#### POINT FOUR.

**Under controlling decisions of the Supreme Court of Oklahoma the present action is estopped or barred by the state court judgment in *Miller v. Miller*.**

In support of this proposition we rely upon the well settled rule in Oklahoma that:

“Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties and their privies in a subsequent suit, irrespective of whether or not the causes of action are the same.”

—*Cressler v. Brown*, 79 Okl. 170, 192 Pac. 417;

*Woodworth v. Town of Hennessey*, 32 Okl. 267, 122 Pac. 224;

*Johnson v. Gillett*, 66 Okl. 308, 168 Pac. 1031;

and such judgment is *res adjudicata*,

“not only as to all matters actually litigated and determined in the former action but as to all matters germane to issues which could or might have been litigated or determined therein.”

—*Baker v. Leavitt*, 54 Okl. 70, 73, 153 Pac. 1099, 1100;

*City of El Reno, et al., v. Cleveland-Trinidad Paving Co.*, 25 Okl. 648, 107 Pac. 163;

*Woodworth v. Town of Hennessey*, 32 Okl. 267, 122 Pac. 224;

*Markham v. Dugger*, 34 Okl. 492, 126 Pac. 190;

*Gosnell v. Prince*, 36 Okl. 445, 129 Pac. 27;

*Pioneer Tel. & Tel. Co. v. State*, 40 Okl. 417, 138 Pac. 1033;

*Wiley v. Edmonson*, 43 Okl. 1, 133 Pac. 38;

*Alfrey v. Colbert, et al.*, 44 Okl. 246, 144 Pac. 179;

*Bowen v. Carter, et al.*, 42 Okl. 565, 144 Pac. 170;

*Prince v. Gosnell*, 47 Okl. 570, 149 Pac. 1162;

*Earl v. Earl, et al.*, 48 Okl. 442, 149 Pac. 1179;

*Corrugated Culvert Co. v. Simpson Township*, 51 Okl. 178, 151 Pac. 854;

*Parks v. Haynes*, 52 Okl. 63, 152 Pac. 400.

And to the same effect see:

*Factor Oil Co. v Brydia*, 184 Okl. 113, 85 P. (2d) 311;

*Hine v. Board of County Commissioners*, 188 Okl. 260, 108 P. (2d) 112;

*Uphoff v. Meier*, 184 Okl. 378, 87 P. (2d) 960;

*Cunningham v. Oklahoma City, et al.*, 188 Okl. 466, 110 P. (2d) 1102.

In the state suit respondent pursued a remedy she had a right to invoke. The alleged alimony contract sued on in the instant action represents the same claim that was adjudged against respondent in the state court after a trial upon the merits.

Even if respondent had in no wise relied upon the alleged alimony contract (which she did) she is nevertheless barred under the foregoing controlling Oklahoma authorities from bringing the instant action.

POINT FIVE.

**No Oklahoma Supreme Court decisions cited in the opinion of the Circuit Court of Appeals supports its decision, but so far as pertinent support our contentions.**

The Oklahoma cases hereinbefore cited sustain our position and do not sustain the opinion of the Circuit Court of Appeals. We will now refer to all the remaining Oklahoma cases cited by that court.

The Circuit Court of Appeals holds "that a separation agreement, otherwise valid and enforceable, is not extinguished but survives a subsequent divorce and alimony decree."

The court's statement is correct as to a divorce decree which is silent as to alimony, but the court went too far when it held that a separation agreement survived an alimony decree. Such contract never survives an alimony decree and only where the divorce decree is silent as to alimony and the issue of alimony was not tendered and determined does such a separation agreement, if valid, survive.

Cited in support of the above holding of the Circuit Court of Appeals are the following Oklahoma cases:

*King v. King*, 138 Okl. 40, 280 Pac. 271;

*Murphy v. McElroy*, 185 Okl. 388, 92 P. (2d) 369;  
*Seyler v. Seyler*, 190 Okl. 250, 122 P. (2d) 804;  
*Elliott v. Dunham*, 130 P. (2d) 534;  
*Stark v. Stark*, 185 Okl. 348, 91 P. (2d) 1064.

*King v. King*, *supra*, the issue of alimony had never been determined.

*Murphy v. McElroy*, *supra*, “\* \* \* the divorce decree made no reference to property settlement or alimony \* \* \*.”

*Seyler v. Seyler*, *supra*:

“\* \* \* There was no issue of alimony, division of property or property settlement presented in the pleading or settled by the court.”

*Elliott v. Dunham*, *et al.*, *Dunham v. Same* (two cases), *Elliott v. Pugh*, *et al.*, (two cases) (Okla., not yet officially reported), 130 P. (2d) 534, the contract between husband and wife and third parties covered alimony and other matters. There were four cases and the appeals of the four cases were consolidated. The alimony part of the contract was not involved on appeal.

*Stark v. Stark*, *supra*, was an action upon a separate maintenance agreement. The parties were separated but not divorced and the issue of alimony had never been tendered and determined by any court.

Another Oklahoma case cited by the Circuit Court of Appeals is *Wheeler v. Wheeler*, 167 Okl. 598, 32 P. (2d) 305. This case does not sustain the opinion of the Circuit Court of Appeals. It lays down the following rule which the trial court must follow when a property settlement or maintenance and alimony contract is brought before a divorce or alimony court:

“\* \* \* The court in the exercise of its chancery pow-

ers and the mandatory statutory duty, must look beyond the terms of the agreement to ascertain all the facts and circumstances surrounding its execution and consider the relationship of the parties at the time of the trial, their ages, needs, health, financial conditions, opportunities to provide for themselves, \* \* \*."

### **Conclusion.**

The decision of the Circuit Court of Appeals sustains the instant action, which under controlling decisions of the Supreme Court of Oklahoma is barred by the former judgment of the state court in a previous suit and it could not have been maintained in any state court in Oklahoma. This decision conflicts with the doctrine and policy of the *Erie R.* case and subsequent decisions following it, and should, therefore, be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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